# Dayrell Walter Entrie v Datuk Patinggi Tan Sri Alfred Jabu Anak Numpang

HIGH COURT (SRI AMAN) — ELECTION PETITION NO 26–02 OF 2006-II(SG)
LAU BEE LAN J
2 OCTOBER 2006

*Election — Petition — Application for declaration that elections were null and void — Non-compliance with Election Petition Rules — Whether petitioner must demonstrate that non compliance affected the result of election — Election Offences Act 1954 s 32(a)*

The petitioner was a candidate in the Sarawak state constituency of Layar in the recently held elections on 20 May 2006. There were initially two other respondents, ie the first and second respondents but after a preliminary objection raised by first and second respondents on the ground that the election petition has not disclosed any cause of action against them and petitioner by his counsel has confirmed that he is not contesting the objection, the court ordered the first and second respondents' name to be struck out. The third respondent was the returned candidate, Datuk Patinggi Tan Sri Alfred Jabu Anak Numpang. The third respondent intimated to the court that they would be filing a notice of motion to strike out the petition which was set for hearing on 14 September 2006. At the hearing of notice of motion, the petitioner raised a preliminary objection that the said motion is defective and improperly filed, being filed by an individual, the advocate Mr Sim Hui Chuang who is not permitted under the Election Petition Rules 1954 or the Rules of the High Court 1980 and therefore must be struck out. In this case, the third respondent has chosen to present the preliminary objection by way of a notice of motion and the petitioner has chosen to present his preliminary objection by way of a notice of preliminary objection. The notice of motion to strike out the petition was premised on the grounds that the petitioner's failure to comply with rr 3(2), 9, 15, 34 of the Election Petition Rules 1954 ('the Rules') and ss 32(a), 34(a) to (c) of the Election Offences Act 1954.

**Held**:

(1) There is no procedure with respect to the mode of how a preliminary objection is to be raised in the Election Offences Act 1954. If parties choose to give notice, there is no hard and fast rule of how the preliminary objection is to be made as the purpose of the preliminary objection is to give early notice to the opponent as to the grounds which the party proposing to raise the preliminary objection wishes to raise. The issue of notice of motion being filed by an

individual does not arise because for all intent and purposes, the notice of motion is filed by Mr Sim Hui Chuan as Advocate acting for the third respondent (see para 3).

(2) In considering and weighing the affidavit evidence contained in the various affidavits referred to in this notice of motion, the court is mindful of the principles in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 and *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 with regard to the treatment of affidavits where there are dispute of facts. Having found that the petitioner has failed to fulfil the requirements of r 3(2) that imposed a statutory obligation on the petitioner to leave two copies of the petition with the court, the petition is dismissed on the ground of non-compliance with r 3(2) (see paras 11–12)).

(3) It is clear from the facts that the election petition papers were not served on the third respondent whether personally or by pre-paid registered post within 15 days of its presentation as required by r 15 of the Rules. The consequence of the petitioner's failure thereof means that the jurisdiction of the election court is not invoked since the provisions regarding service of an election petition are mandatory, not merely directory and must be strictly observed with; and failure to comply would result in the election petition being dismissed (see para 31).

(4) Rule 34 requires the petitioner's advocate, immediately upon his appointment to leave written notice of his appointment as the petitioner's advocate, at the office of the registrar not only applies to the petitioner's advocate but also to the respondent's advocate and the said rule imposes an obligation on the petitioner's or the respondent's advocate as the case may be and not on the petitioner or respondent. The term 'advocate' in r 9 of the rules refers to an individual and not to a firm is substantiated by the manner in which the term 'advocate' is used in various other statutes (see paras 34–36).

(5) However, the petitioner has named a firm of 'Advocates' and not 'an advocate' in the notice 'Appointment of Advocate by petitioner'. Since r 9 of the Rules contains a reference to 'an advocate' and not a firm of advocates, the petitioner has not complied with rr 9 and 34 of the Rules which are couched in mandatory terms like r 3(2) of the Rules. That being the case, by virtue of the plethora of authorities that election laws are to be strictly complied with, by naming a firm or advocates and not his individual advocate or advocates and by not immediately leaving a written notice of appointment of advocate, the petitioner and the petitioner's advocate has failed to comply with rr 9 and 34 of the Rules which warrants the petition to be dismissed on both grounds (see para 38).

(6) In *Dato' Ismail Kamus v Pegawai Pengurus Pilihanraya, (Zainal Abidin bin Azim) & Ors* [2005] 3 MLJ 193; *Gan Joon Zin v Fong Kui Lun* [2004] 4 CLJ 729, in relation to s 32(b) of the Act, the Federal Court make it clear that in order to avoid the election, not only must non-compliance be shown; the petitioner needs also to prove that the non-compliance had affected the result of the election. In this instant case although the ground relied upon by the

petitioner is s 32(a) and not s 32(b) of the Act, a similar approach ought to be adopted in the interpretation of s 32(a), that is the petitioner has to demonstrate to the court how the allegation of general bribery, general treating or general intimidation has so extensively prevailed that they may be reasonably supposed to have affected the result of the election. Thus on the facts and on the allegations made in the petition which are denied by the third respondent, even if proved, the petitioner would not be able to demonstrate how the results of the election would have been affected within the meaning of s 32(a) of the Act (see para 45).

**[Bahasa Malaysia summary**

Dalam satu pilihanraya yang diadakan pada 20 Mei 2006, pempetisyen adalah pencalon di negeri Layar di Sarawak. Pada mulanya terdapat dua lagi responden, iaitu responden pertama dan responden kedua tetapi selepas satu bantahan awal yang dibangkitkan oleh responden pertama dan responden kedua atas alasan bahawa petisyen pilihanraya tidak mendedahkan sebarang kausa tindakan terhadap mereka dan pempetisyen melalui peguamcaranya telah mengesahkan bahawa beliau tidak akan mempertikaikan bantahan tersebut, mahkamah telah memerintahkan permohonan responden pertama dan kedua dibatalkan. Responden ketiga merupakan calon yang dipilih, Datuk Patinggi Tan Sri Alfred Jabu Anak Numpang. Responden ketiga menyatakan kepada mahkamah bahawa mereka akan memfailkan notis usul untuk membatalkan petisyen yang telah ditetapkan untuk pendengaran pada 14 September 2006. Pada pendengaran notis usul, pempetisyen telah membangkitkan satu bantahan awal bahawa usul tersebut adalah cacat dan tidak difailkan dengan betul, kerana telah difailkan oleh seorang individu, peguamcara En Sim Hui Chuang yang tidak dibenarkan di bawah Kaedah-Kaedah Petisyen Pilihanraya 1954 atau Kaedah-Kaedah Mahkamah Tinggi 1980 dan dengan itu patut dibatalkan. Dalam kes ini, responden ketiga memilih untuk membuat bantahan awal melalui notis usul dan pempetisyen memilih untuk membuat bantahan awalnya melalui notis bantahan awal. Notis usul untuk membatalkan petisyen adalah atas alasan-alasan bahawa pempetisyen gagal mematuhi kk 3(2), 9, 15, 34 Kaedah-Kaedah Petisyen Pilihanraya 1954 ('kaedah tersebut') dan ss 32(a), 34(a) sehingga (c) Akta Kesalahan Pilihanraya 1954.

**Diputuskan**:

(1) Tiada prosedur berhubungan dengan cara suatu bantahan awal patut dibangkitkan di dalam Akta Kesalahan Pilihanraya 1954. Sekiranya pihak-pihak memilih untuk memberi notis, tiada peraturan yang tegas dan ketat bagaimana bantahan awal itu patut dibuat oleh kerana tujuan bantahan awal adalah untuk memberikan notis pendahuluan kepada penentang akan alasan-alasan yang mana pihak yang ingin membangkitkan bantahan awal tersebut ingin membangkitkannya. Isu notis usul yang difailkan oleh seorang

individu tidak berbangkit oleh kerana sebenarnya, notis usul difailkan oleh En Sim Hui Chuan sebagai peguamcara yang bertindak untuk responden ketiga (lihat perenggan 3).

(2) Dalam menimbangkan keterangan afidavit yang terkandung di dalam afidavit-afidavit yang dirujuk dalam notis usul ini, mahkamah sedar akan prinsip di *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 dan *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 berhubungan dengan cara melayan afidavit-afidavit sekiranya terdapat pertikaian fakta-fakta. Setelah mendapati pempetisyen telah gagal memenuhi keperluan k 3(2) yang mengenakan satu obligasi statutori ke atas pempetisyen untuk meninggalkan dua salinan petisyen dengan mahkamah, petisyen ini ditolak atas alasan ketidakpatuhan kepada k 3(2) (lihat perenggan 11–12).

(3) Ia adalah jelas daripada fakta-fakta bahawa suratcara-suratcara petisyen pilihanraya tidak disampaikan kepada responden ketiga samada secara penyampaian kediri ataupun melalui pos berdaftar pra-bayar dalam masa 15 hari dari tarikh pengemukaannya seperti yang diperuntukkan oleh k 15 kaedah tersebut. Akibat daripada kegagalan pempetisyen, bidang kuasa mahkamah pilihanraya tidak terpakai oleh kerana peruntukan-peruntukan berhubungan dengan penyampaian petisyen pilihanraya adalah mandatori, dan bukan hanya arahan dan mestilah dipatuhi dengan ketatnya; dan kegagalan mematuhinya akan mengakibatkan petisyen pilihanraya ditolak (liaht perenggan 31).

(4) Kaedah 34 memerlukan peguamcara pempetisyen, sebaik sahaja dilantik untuk meninggalkan satu notis bertulis akan pelantikannya sebagai peguamcara pempetisyen, di pejabat Pendaftar bukan sahaja terpakai terhadap peguamcara pempetisyen tetapi juga peguamcara responden dan Kaedah tersebut memperuntukkan obligasi ke atas peguamcara pempetisyen atau responden yang berkenan dan bukannya ke atas pempetisyen atau responden. Perkataan 'advocate' di k 9 Kaedah tersebut merujuk kepada seorang individu dan bukannya firma dan ini disokong dengan cara perkataan 'advocate' digunakan di pelbagai undang-undang lain (lihat perenggan 34–36).

(5) Akan tetapi, pempetisyen telah menamakan satu firma sebagai 'Advocates' dan bukannya 'an advocate' di dalam notis 'Appointment of Advocate by petitioner'. Oleh kerana kaedah 9 Kaedah tersebut mengandungi rujukan kepada 'an advocate' dan bukannya satu firma peguamcara-peguamcara, pempetisyen telah tidak mematuhi kk 9 dan 34 Kaedah tersebut yang menggunakan perkataan-perkataan mandatori seperti di k 3(2) Kaedah tersebut. Dalam keadaan begitu, mengikut autoriti-autoriti yang berlebihan bahawa undang-undang pilihanraya mesti diikuti dengan tegasnya, dengan menamakan satu firma atau peguamcara-peguamcara dan bukannya seorang peguamcara individu atau peguamcara-peguamcara individu dan dengan tidak meninggalkan satu notis bertulis pelantikan peguamcara dengan segera, pempetisyen dan peguamcara pempetisyen telah gagal mematuhi kk 9 dan 34 Kaedah tersebut yang membenarkan petisyen ditolak atas kedua-dua alasan tersebut (lihat perenggan 38).

(6) Dalam kes *Dato' Ismail Kamus v Pegawai Pengurus Pilihanraya, (Zainal Abidin bin Azim) & Ors* [2005] 3 MLJ 193; *Gan Joon Zin v Fong Kui Lun* [2004] 4 CLJ 729, berhubungan dengan s 32(b) Akta tersebut, Mahkamah Persekutuan telah menjelaskan bahawa untuk membatalkan pemilihan, bukan sahaja ketidakpatuhan patut ditunjukkan; pempetisyen juga perlu membuktikan bahawa ketidakpatuhan telah menyentuh keputusan pilihanraya tersebut. Dalam kes ini walaupun alasan yang pempetisyen bergantung kepada adalah s 32(a) dan bukan s 32(b) Akta tersebut, pendekatan yang sama harus diambil dalam tafsiran s 32(a), iaitu pempetisyen mesti menunjukkan kepada mahkamah bagaimana dakwaan penyogokan am, penjamuan am ataupun ugutan am telah berlaku sebegitu berleluasa sehingga ia boleh dijangkakan dengan semunasabahnya telah menyentuh keputusan pilihan raya itu. Dengan itu atas fakta-fakta dan atas dakwaan-dakwaan yang dibuat di dalam petisyen yang dinafikan oleh responden ketiga, walaupun ia dibuktikan, pempetisyen tidak akan dapat menunjukkan bagaimana keputusan-keputusan pilihanraya telah menyentuh dalam maksud s 32(a) Akta tersebut (lihat perenggan 45).]

**Notes**

For cases on application for declaration that elections were null and void, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1902–1906.

**Cases referred to**

*Armagas Ltd v Mundogas SA (The 'Ocean Frost')* [1985] 1 Lloyd's Report 1 (refd)
*Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (folld)
*Charlee Soh Cheng Hiong v Pengerusi Pilihan Raya Negeri Sarawak & 2 Ors* [2002] 1 LNS 133 (refd)
*Chiew Chiu Sing v Dato' Seri Tiong King Sing* [2004] 8 CLJ 82 (refd)
*Chong Thain Vun v Watson & Anor; Hamid Datun v Majanggil & Anor; Richard E Yap v Tun Datu Mustapha bin Datu Harun* [1968] 1 MLJ 65 (refd)
*Dr Lee Chong Meng v Abdul Rahman bin Haji Abdullah, Returning Officer & Ors (No 2)* [2000] 3 MLJ 218 (refd)
*Dato' Ismail Kamus v Pegawai Pengurus Pilihanraya, (Zainal Abidin bin Azim) & Ors* [2005] 3 MLJ 193 (folld)
*Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261 (refd)
*Eastern & Oriental Hotel* (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35 (refd)
*Edward Stanley Jugol anak Benedict Sandin v Datuk Peter Nyarok ak Entrie* Election Petition No 26–01 of 2006-I (SG) (unreported)
*Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (folld)
*Gan Joon Zin v Fong Kui Lun* [2004] 4 CLJ 729 (folld)
*Mohamad Hanafi bin Seman Iwn Wan Othman bin Wan Yusoff dan Iain-lain* [2000] 3 MLJ 482 (refd)
*Norbert Choong Kai Chong & Anor v Mohamed Idris bin Haji Ibrahim & Anor* [1980] 1 MLJ 316 (refd)

*Ramley Mansor v Suruhanjaya Pilihanraya Malaysia & Ors* [2000] 6 CLJ 56 (refd)
*Rhina Bhar @ Rani Raj Pal v Karpal Singh a/l Ram Singh & 2 Ors* [1995] 4 CLJ 642 (refd)
*Ruhimin Adzmin @ Ruhimin bin Ajim v Tan Sri Bernard Dompok & Ors* [2005] 1 MLJ 345 (refd)
*Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 (refd)
*Wilfred Nissom v Datuk Stephen Yong & Anor; Mohamad Shamsuddin bin Moktar v Chong Kim Mook & Anor* (Kuching Election Petition No K 1 & 2 of 1979] (unreported) (refd)

**Legislation referred to**

Advocates Ordinance Sabah 1953 s 4
Advocates Ordinance Sarawak 1953 (Reprint 1966) Sarawak Cap 110 s 4
Bankruptcy Act 1967 s 2
Election Offences Act 1954 ss 32(a), (b), 34(a), (b), (c), 42
Election Petition Rules 1954 rr 2, 3(1), (2), 9, 10, 15, 17, 21(2), 22(1), 34, 35
Legal Profession Act 1976 s 3
Rules of the High Court 1980 O 1 r 7, O 6 r 4, O 8 r 3, O 18 r 19, Form 9, Form 10

*Dominique Ng (Baru Bian and See Chee How with him) (Dominique Ng & Associates) for the petitioner.*
*Dato' Cecil Wilbert Mohanaraj Abraham (Sim Hui Chuang and Lim Lip Sze with him) (Reddi & Co) for the third respondent.*
*Datuk JC Fong (State Attorney-General Sarawak) (Supian Tarmizi bin Mohd Tazuddin, State Legal Officer) watching brief.*

**Lau Bee Lan J:**

**[1]** The petitioner, Dayrell Walter Entrie was a candidate in the Sarawak State Constituency of Layar (N.31) in the recently held elections on 20 May 2006. The respondents were the Returning Officer of the Constituency ('the first respondent'), the Chairman of the Election Commission ('the second respondent') and the returned candidate, Datuk Patinggi Tan Sri Alfred Jabu Anak Numpang ('the third respondent').

**[2]** On 14 August 2006, with regard to the preliminary objection raised by first and second respondents on the ground that the election petition has not disclosed any cause of action against first and second respondents and petitioner by his counsel has confirmed that he is not contesting the objection, the court ordered the first and second respondents' application to be struck out with agreed cost of RM1,000 to be paid two weeks from today (14 August 2006). Mr Sim Hui Chuang, Advocate for the third respondent intimated to the court that they would be filing a notice of motion to strike out the petition which was set for hearing on 14 September 2006.

**[3]** At the hearing of notice of motion to strike out the petition by the third respondent dated 14 August 2006 (encl 29), Mr Baru Bian, one of the three

Advocates appointed by the petitioner informed the court of a preliminary objection which was raised by the petitioner. The matter was heard on 14 September 2006 and I had ruled as follows:

Re: Preliminary Objection of the petitioner dated 11 September 2006 (encl 49)

(1) The petitioner raised a Preliminary Objection to the filing of the notice of motion of the third respondent (encl 29) this morning on the grounds that the said Motion is defective and improperly filed, being filed by an individual, the advocate Mr Sim Hui Chuang who is not permitted under the Election Petition Rules 1954 or the of Rules of High Court 1980 and therefore must be struck out.

(2) After hearing the oral submissions of Mr Baru Bian, leading counsel for the petitioner and Dato' Cecil Abraham, leading counsel for the third respondent, the court's findings are as follows:

2.1 The starting point governing procedure and practice on election petitions is s 42 of the Election Offences Act 1954 (Act 5) which provides —

(1) The procedure and practice on election petitions shall be regulated by the Election Petition Rules 1954 as provided for in the Second Schedule.

(2) When any matter is not expressly provided for in the Election Petition Rules 1954, the High Court Rules 1980 [PU (A) 50/1980] shall apply.

2.2 It is to be noted that there is no procedure with respect to the mode of how a preliminary objection is to be raised in the Election Offences Act 1954. However, in the case of*Norbert Choong Kai Chong & Anor v Mohamed Idris Bin Haji Ibrahim & Anor* [1980] 1 MLJ 316 where Harun J (as he then was) held that 'that objections to an election petition are issues of law which should be disposed of as preliminary issues for which no notice is required. 'This was followed in*Ruhimin Adzmin @ Ruhimin bin Ajim v Tan Sri Bernard Dompok & Ors* [2005] 1 MLJ 345 where Datuk Clement Skinner J overruled the objection when it was argued that an application under O 18 r 19 of the Rules of the High Court 1980 should be filed to raise the objections instead of raising them as preliminary objections. Both are decisions which I agree and which I respectfully adopt.

2.3 Be that as it may, as a matter of practice, it is to be noted that there are a number of cases where preliminary objections in respect of election petitions are presented by way of notice of motion as in*Ramley Mansor v Suruhanjaya Pilihanraya Malaysia & Ors* [2000] 6 CLJ 56 (see p 58 para c), *Ruhimin Adzmin @ Ruhimin bin Ajim*'s case and *Chiew Chiu Sing v Dato Seri Tiong King Sing* Election Petition No 26–1 of 2004 (BTU)(2004) (a case cited by the petitioner). In this case, the third respondent has chosen to present the preliminary objection by way of a notice of motion which as submitted by Dato' Cecil Abraham is given for the convenience of the court and the petitioner. On the other hand, the petitioner has chosen to present his preliminary objection by way of a notice of preliminary objection (encl 49). I am of the view that if parties choose to give notice, there is no hard and fast rule of how the preliminary objection is to be made as the purpose of the preliminary objection is to give early notice to the opponent as to the grounds which the party proposing to raise the preliminary objection wishes to raise.

2.4 Order 8 r 3 of the RHC provides that the notice of the originating motion must be in Form 9 and the notice of any other motion in Form 10. The preliminary objection raised by the third respondent is an interlocutory motion which is 'commonly used to denote those motions which are not originating and those

which are not motions for judgment' (see para 8.1.3 of the High Court Practice: Issue 10). If it is to be argued that O 8 r 3 of the RHC applies, the form applicable is Form 10. Order 1 r 7 of the RHC states 'The Forms in Appendix A shall be used where applicable with such variations as the circumstances of the particular case require. ' Hence, in my view the word 'solicitor' which appears in the Form can be easily modified to 'advocate'. Order 6 r 4 of the RHC which is cited by Mr Baru Bian in my view is irrelevant because according to O 8 r 3(3) of the RHC, 'Order 6 r 4 shall, with the necessary modifications, apply in relation to a notice of an originating motion as it applies in relation to a writ.... and in this instant case, we are not dealing with a notice of an originating motion but of an interlocutory motion.

2.5 There is no dispute that Mr Sim Hui Chuan is an advocate for the third respondent as this is even acknowledged by the petitioner when he copied the notice of preliminary objection (encl 49) to the third respondent as:

> Through his Advocate,
>
> Sim Hui Chuan,
>
> No 29, Kai Joo Lane,
>
> 93000 Kuching, Sarawak.

and not disputed by Mr Baru Bian in his submission (see p 8 of NOP). Therefore, the issue of notice of motion being filed by an individual does not arise because for all intent and purposes, the notice of motion is filed by Mr Sim Hui Chuan as advocate acting for the third respondent.

2.6 In the circumstances, I rule that the preliminary objection of the petitioner that the notice of motion is defective and improperly filed is without merit and is dismissed.

**[4]** The notice of motion to strike out the petition was premised on the following eight grounds:

(1) The petitioner has failed to comply with r 3(2) of the Election Petition Rules 1954 (the 'Rules'). The petitioner did not leave, '...with the petition two copies thereof.'

(2) The petitioner has failed to comply with r 9 of the Rules. The petitioner failed to give '...the name of an advocate whom he... authorize[d] to act as his... advocate... and giving an address within Malaysia at which notices may be left.

(3) The petitioner's advocate has failed to comply with r 34 of the Rules. The petitioner's advocate failed to '...immediately upon his appointment... leave written notice thereof at the office of the Registrar.

(4) The petitioner has failed to comply with s 34(a) to (c) of the Election Offences Act 1954 (the 'Act'). The section requires the person presenting the election petition to the High Court to be the petitioner. The petition was, instead, presented by an employee of Messrs Dominique Ng & Associates.

(5) The petitioner has failed to comply with r 15 of the Rules. Notice of the presentation of a petition, accompanied by a copy of the petition was not

served on the respondent within 15 days of the presentation of the petition in the circumstances.

(6) Further, the purported 'Notice of petition' dated 13 July 2006 does not comply with r 15 of the Rules and is misleading as regards the mode employed by the petitioner to serve the petition.

(7) There is clearly no basis to allege general bribery, general treating or general intimidation as having prevailed to such an extent so as to reasonably suppose that the result of the elections were affected within the meaning of s 32(a) of the Act.

(8) Following from the above, the petition does not disclose a factual or legal basis for a declaration that the election is void pursuant to s 32(a) of the Act.

**[5]** On 21 September 2006 Dato' Cecil Abraham, leading counsel for the third respondent informed the court that the third respondent was abandoning ground 4 above (non- compliance with s.34(a) to (c) of the Act. I shall now deal with the remaining grounds.

**[6]** Non-compliance with r 3(2) of the Rules. Rule 3(2) states of the Rules:

(2) There shall also be left with the petition two copies thereof.

It is the third respondent's complaint that the petitioner has not complied with r 3(2) of the Rules because there were no copies of the petition left with the original petition in the court file. To support this objection the third respondent relied on the affidavit affirmed on 10 August 2006 (encl 32) of Noor Hasmah bte Jamaludin, the Pembantu Tadbir Undang-Undang of the Registry of the High Court at Kuching stating that on 13 July 2006 she was on duty at the Registry of the High Court in Kuching when one Puan Niloh an employee from Messrs Dominique Ng & Associates, filed the following documents:

(a) covering letter from Messrs Dominique Ng & Associates, Advocates & Solicitors dated 13 July 2006;

(b) receipt of election petition;

(c) notice of petition;

(d) election petition;

(e) appointment of advocate by petitioner;

(f) praecipe for election petition;

(g) praecipe for notice of petition;

(h) praecipe for deposit; and

(i) praecipe for appointment of advocates.

**[7]** Noor Hasmah bte Jamaludin further stated, inter alia, that after the documents were processed, one Doreen Sameni kept one copy of each of the notice of petition,

the election petition and the appointment of advocate by petitioner and gave back all other copies of the same to Puan Niloh; only the original petition was left in the court file. This fact is corroborated by Lim Lip Sze who vide his affidavit affirmed on 11 August 2006 (encl 31) deposed that on 27 July 2006 at about 2:15pm, at the High Court Registry, he conducted a search of the court file and discovered that there was only one copy of the election petition in the file and the petitioner had failed to leave with the High Court Registry two copies of the election petition in file.

**[8]** Learned counsel for the petitioner, Mr Dominique Ng contended that there were more than the statutorily required number of copies of the election petition filed and relied on the affidavit of Niloh anak Ason affirmed on 7 September 2006 (encl 54) stating that I did on 13 July 2006 bring seven copies each of (sic) the election petition, Acknowledgment of receipt, notice of petition and appointment of advocates by the petitioner at the High Court Registry and passed all the seven copies each to the staff at the High Court Registry. After the High Court Registry Counter staff checked all the seven copies each of those, I was asked to pay the filing fee at the payment counter. After the receipt was given to me, I went back to the Registry Counter and give the praecipe to the staff. The Registry Counter staff retained seven copies of the acknowledgment of receipt, 1 copy each of election petition, notice of petition and appointment of Advocates by the petitioner and returned to me six copies of election petition, notice of petition and appointment of advocates by the petitioner.' It was also submitted that the affidavit evidence of Noor Hasmah (encl 32) also supported this fact. Further, learned counsel for the petitioner contended it was due to no fault of the petitioner that the High Court Registry refused to accept the additional copies quoting, '[T]hey only need to retain one copy each of the said documents' and '[T]hey do not need so many copies' and it would be unjust to strike the petition for there was no wilful failure on the part of the petitioner.

**[9]** Enclosures 51 and 54 are the affidavits of the petitioner and Niloh ak Ason filed on 12 September 2006 outside the time period directed by the court on 14 August 2006. Notwithstanding this fact, there appears before the court dispute as to facts appearing in the affidavits encls 51, 54 and 58 vis-a-vis encls 32 and 31. In this regard, the court is entitled to adopt the approach advocated in*Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 where the Supreme Court dealt with a contest of facts in an affidavit and applied the ratio of the Privy Council in *Eng Mee Yong & Ors vetchumanan* [1979] 2 MLJ 212 at p 408C:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbably in itself it may be.

Further, the Supreme Court at p 408E–F held:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion,

> denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable.

(See also *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433) which is also cited on behalf of the third respondent.

**[10]** In considering and weighing the affidavit evidence contained in the various affidavits referred to in this notice of motion, the court is mindful of the aforesaid principles with regard to the treatment of affidavits where there are dispute of facts. With respect I cannot agree with the contentions of the learned counsel for the petitioner for the following reasons. The affidavit of Niloh (encl 54) in paras 3 and 4 confirmed that only the original petition was filed on 13 July 2006. Although Niloh deposed that another copy was filed between 2–3pm on the 13 July 2006 (para 5 of encl 54) which Arbi bin Sedi confirmed (paras 2 and 3 in encl 58), Mr Baru Bian at p 15 of the notes of proceedings of 14 September 2006 at lines 1–6 conceded only one original and one copy was filed. Mr Lim Lip Sze confirmed that the search at 2.15pm on 27 July 2006 established that only 1 original petition was filed and there were no copies (para 2 in encl 31). Noor Hashmah confirmed that only one copy of the petition was retained by the Registry (para 3 in encl 32). The petitioner confirmed that only two copies of the election petition were left with the High Court on 13 July 2006 (para 3 in encl 51). Therefore, I agree as submitted by both the learned counsel for the third respondent the only inference which can drawn from these affidavits and the admission of counsel Mr Baru Bian is that only one copy was filed at 10am on 13 July 2006 and one further copy was filed between 2–3pm on 13 July 2006.

**[11]** In submitting that the petitioner was not trying to put any blame on anybody; that the six copies of the petition were returned and but 'the failure' if there is a failure is certainly not the fault of the petitioner, to my mind the learned counsel for the petitioner is skirting the issue; in one breath he acknowledged that the petitioner was not blaming anyone, yet in another breath, he said the said the blame did not lie with the petitioner. If the petitioner says the fault lies with the court, he certainly cannot do so as held by Augustine Paul J (now Federal Court judge) in *Ramely Mansor v Suruhanjaya Pilihanraya Malaysia & Ors* [2000] 6 CLJ 56:

> The issue was whether the petitioner had discharged his responsibility by filing the four additional copies of the petition even though they were returned to him by the court. The respondents contended that the court could not be faulted for returning the four copies of the petition to the petitioner. This was because it was the responsibility of the petitioner to ensure that a copy was left with the court for the purpose of service.

In addressing the issue at pp 61g-i–62a-f, his Lordship in lucid terms stated:

> It is my view that the responsibility of ensuring that a copy of the petition is left with the court for service on the respondent is that of the petitioner even though the additional

copies filed were returned to Mm. The language of r 3(2) imposes a statutory obligation on the petitioner to leave two copies of the petition with the court. Rule 3(2) does not say, as correctly submitted by learned counsel for the third respondent, that the court shall retain two copies of the petition in which event it will become the responsibility of the court to do so when more than two copies are filed. The words '... shall also be left...' in r 3(2) show that it is the obligation of the petitioner to leave the two copies with the court. In other words, it is his duty to inform the court, at the time of filing the petition, of the requirement to leave the two copies with the court. Furthermore, learned counsel for the petitioner ought to have been aware that it is the accepted practice in the courts, well-known to practitioners, that upon documents being filed in court the court retains the original and returns the copies to the person filing the same for purposes of service. He ought to have returned the copies to the court in view of the mandatory requirement of r 3(2). Learned counsel also ought to have been aware, when he caused the notice of presentation of the petition to be published, that the notice expressly required the respondent to obtain a copy of the petition from the court. Clearly, the court cannot provide a copy of the petition to the respondent when all the copies are with the petitioner. This at least ought to have alerted the petitioner to ensure that a copy of the petition is immediately dispatched to the Registrar for the purpose of being handed over to the respondent. The petitioner did not realise the folly of his own inaction. It follows, therefore, that the accusation by learned counsel for the petitioner that the fact that the court did not know the procedure is not the fault of the petitioner is totally ill-founded and unwarranted when, in actual fact, the person who did not know the procedure was he himself. It is unreasonable, to my mind, to look around for scapegoats to cover one's inadvertence and lack of care and attention. I was therefore of the firm view that the return of the four copies of the petition by the High Court, in the regular performance of its duties, does not absolve the petitioner of ensuring that the required number of copies are returned to the Registrar to enable the respondent to collect it. The result is that the third respondent had not been served with the petition as a copy thereof was not available at the High Court registry for collection by the third respondent at the expiry of the fifteen-day period. The fact that the petitioner made the copies available to the court after the expiry of the fifteen-day period does not cure the defect as the time period is mandatory. The court has an inherent power to dismiss an election petition which has become a nullity by failure to serve it within the prescribed time (see *Devon Nair v Yong Kuan Teik* [1967] 1 MLJ 261). Accordingly, I dismissed the petition against the third respondent. (Emphasis added.)

**[12]** Having found that the petitioner has failed to fulfil the requirements of r 3(2) of the Rules what would be the consequence thereof? From the passage in the judgment in *Ramely Mansor* quoted above the Election Court dismissed the petition on the basis that r 3(2) imposed a statutory obligation on the petitioner to leave two copies of the petition with the court. In *Dr Lee Chong Meng v Abdul Rahman bin Haji Abdullah, Returning Officer & Ors (No 2)* [2000] 3 MLJ 218, the same learned judge dismissed the petition, inter alia, on the ground that r 3(2) requires two copies to be left with the petition at the time of presentation but the two copies left behind by the petitioner were one copy of the petition and one copy of the original petition for the use of the court. Similar approaches were adopted by the court in *Chiew Chiu Sing v Dato' Seri Tiong King Sing* [2004] 8 CLJ 82, *Ruhimin Adzmi @ Ruhimin bin Ajim v Tan Sri Bernard Dompok & Ors* [2005] 1 MLJ 345, *Mohamad Hanafi bin Seman lwn Wan Othman bin Wan Yusoff dan lain-lain* [2000] 3 MLJ 482, the recent

judgment of Datuk Clement Skinner J in *Edward Stanley Jugol anak Benedict Sandin v Datuk Peter Nyarok ak Entrie*, Election Petition No 26–01 of 2006-I (SG) (unreported) (see pp 12–16 (a case on similar facts)). Following the aforesaid decisions which I respectfully agree with, I would dismiss the petition on the ground of non-compliance with r 3(2).

NON-COMPLIANCE WITH RULE 15 OF THE RULES

**[13]** Rule 15 of the Rules provides

> 15. (1) Notice of the presentation of a petition, accompanied by a copy of the petition, shall, within fifteen days of the presentation of the petition, be served by the petitioner —
>
> (a) on the respondent personally which shall be effected by delivering the notice and a copy of the petition to the respondent;
>
> (b) by sending the notice and a copy of the petition by pre-paid registered post addressed to the respondent at his usual or last known place of residence or business; or
>
> (c) by posting a notice on the notice board of the High Court in the State in which that constituency or electoral ward is situated and by publishing a notice in a national language newspaper and in any other newspaper circulating within the constituency or electoral ward in which the election was held stating that such petition has been presented and that a copy of the notice of presentation of the petition and a copy of the petition may be obtained by the respondent free of charge on application at the office of the Registrar.

Rule 15 envisages 3 modes of service for the notice of petition and the petition accompanying it to be served by the petitioner. In this instant case the petitioner employed two modes of service namely, personal service and via pre-paid registered post.

WHETHER PERSONAL SERVICE EFFECTED?

**[14]** The petitioner purportedly effected personal service of the papers comprising the, the notice of petition, the receipt of election petition and the appointment of advocate by petitioner on the third respondent through the person of Nicholas Mujah, a clerk of Messrs Dominique Ng & Associates who affirmed an affidavit on 14 August 2006 deposing that he served the same on Wednesday, 24 July 2006 at or about 2.30pm (the original date 26 July 2006 was admitted by the petitioner to be an error).

**[15]** The third respondent disputed that there was any personal service of the election petition papers in the following terms: 'Briefly, on 24 July 2006 about just before 2.30pm, as I entered the corridor of the Dewan Undangan Negeri, near the general desk at the lobby of the Dewan, I was confronted by two men (behind whom was YB Encik Dominique Ng Kim Ho). One of the men, whom I do not recognise, said, 'we want to give you election petition to receive. ' I said, 'you know, any good lawyer will know the procedure for serving election petition.'

**[16]** On 26 July 2006, in response to a letter from the third respondent dated 25 July 2006 (exh AJN-2), Mr. Dominique Ng wrote to the Honourable Speaker of the State Assembly and stated as follows at paras 2 to 3:

> First of all, do allow me to clarify on the incident of the 24 July 2006 referred to in the said letter. I did approach the [third respondent] but at no time did I carry any documents issued by the court. I was trying to invite and request the said [third respondent] to go outside to accept service of the said documents. The said documents relate to an election petition filed against him.
>
> According to the staff of my legal firm, the process server has been trying to serve the [third respondent] with a copy of the said documents several times at other places, but he has failed...

**[17]** The issue of service was raised again on 27 July 2006 (next day) in the State Assembly wherein Mr Dominique Ng spoke as follows (at p 22 last paragraph to p 23 (top) of the Record of Proceedings of the State Legislative Assembly (exh AJN-4):

> Now, this until today we have a process server trying to serve two election petitions on both the Yang Berhormat [ie the third respondent and the Honourable Member for Krian] that you just mentioned and these two election petitions relate to their election to this Honourable house. And time is running out. Now, they have tried their best to go to their office, I think day and night and time is running out, I think tomorrow. I believe, I believe that while a Member should not be stopped from doing his duty to this Dewan and to the people, this immunity should not be used, I am saying that, it should not be used as a shield to prevent them from meeting what would be, I believe, a properly issued court summons. Now, I hope, I hope sincerely hope that the two YBs will, in due course, after the sitting, allow themselves to be served so that the process of court be continued, I mean at the appropriate place and to be arranged.

**[18]** On the other hand, Mr Dominique Ng refuted the contention of the third respondent. He submitted that there was personal service of the election petition papers relying on his affidavit affirmed on 7 September 2006 (encl 53) wherein he deposed 'On 24 July 2006 whereby at or about 2.30pm, Nicholas did approach the third respondent when the third respondent was walking up the stairs leading to the main entrance of the Dewan Undangan Negeri Sarawak. I saw Nicholas pass the said election petition papers to the third respondent. ' He admitted receiving a copy of a letter similar to exh AJN-1 (third respondent's letter dated 25 July 2006 on breach of privileges and immunity) but deposed 'At no time was I holding the said election papers or any documents at all.'; in respect of exh AJN-2 he deposed he had inadvertently omitted the two words 'by me' after the phrase 'on him'. In respect of exh AJN-4, he deposed he had said what he did because he was anxious and uncertain as to whether the said election petition papers had been served: 'But my staff Nicholas did inform me later that it has been effectively served on the third respondent because it has been handed over to him but its only that he has pushed away the served election petition papers. ' He also submitted that the fact that third respondent pushed the said election petition papers away did not negate the fact of personal service because essentially the third respondent acknowledged the fact that

he knew that the documents were election petition papers and the operative words are 'I want to give you election petition for you to receive' and 'election petition for you'.

**[19]** Putting aside the point that encl 53 was filed outside the prescribed period of time directed by the court on 14 August 2006, can the contents therein make a difference at all? As far as exhs AJTN-1, AJN-2, AJN-3 and AJN-4 referred to in the affidavit of the third respondent in encl 37, I agree with both the learned counsel for the third respondent that the court should accept the contemporaneous documents as was adopted in *Eastern & Oriental Hotel* (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35 where at p 37A–B (left column), Wan Hamzah SCJ (delivering judgment on behalf of the Supreme Court) opined:

> We would respectfully agree with the soundness of the observation made in *Armagas Ltd v Mundogas SA* (The 'Ocean Frost') which reads:
>
> > It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

**[20]** The English Court of Appeal in *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Report 1 (The '*Ocean Frost*') was dealing with allegations of fraud and bribery arising out of a trial in the lower court when Lord Justice Robert Goff (as he then was) opined on the court's approach to contemporaneous documents at p 57, (left column)

> Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and *where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth*. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case. (Emphasis added.)

**[21]** Similarly in this case, although it is an election petition, there are several Affidavits involved and following the approach in *Eastern & Oriental Hotel* which is a case involving a tenancy agreement, yet the Supreme Court stated 'This is not strictly speaking a commercial case [unlike The '*Ocean Frost*'], but the relevancy of contemporaneous documents nevertheless holds true.', I find that the contemporaneous documents contradict Mr Dominique Ng's affidavit (encl 53). Further, Mr Dominique Ng has not written to the State Legislative Assembly (Dewan Undangan Negeri Sarawak (DUN)) to correct the omission he alluded to in para 6

of his affidavit (encl 53); therefore, I agree with both the learned counsel for the third respondent that the contemporaneous documents should prevail.

**[22]** With regret, I cannot accept Mr Dominique Ng's argument and his contention cannot hold water because it was not personal service in accordance with the law. Here, I share the views expressed by Datuk Clement Skinner J in his judgment in the Election Petition No 26–01 of 2006-I (SG) at p 18 line 14 to p 19 line 3 as follows:

> In my judgment to effect personal service of the petition on the respondent, a copy of the petition should have been left with him. See O 62 r 3 Rules of the High Court 1980, which states that personal service is effected:
>
> by leaving a copy of the document with the person to be served and...
>
> From the undisputed facts, it is evident that the [Election petition papers were] never left with the [third respondent]. [Notwithstanding the fact that the third respondent pushed the election petition papers] but, at that stage he (Mr Mujah) should not have taken back the document and instead left it as near to the possession and control of the {third respondent] or thrown down a copy of the [Election petition papers] near to the [third respondent] in his presence -while informing him of the nature of the petition and that would have been considered good service (see *Thompson v Pheney* [1832] 1 Down 443), but not having done either and having taken back the [election petition papers] from the [third respondent], it cannot be said that Mr Mujah had served the [Election petition papers] on the [third respondent].

Hence, I find that on 24 July 2006, personal service of the election petition papers had not been effected on the third respondent on the stairs leading to the main entrance of the DUN building.

**[23]** Further the chronological sequence of events showed that as at 26 July 2006, personal service had failed and from the undisputed evidence from the *Hansard* it also showed no personal service of the election petition papers by the petitioner was ever performed on the third respondent as at 27 July 2006.

**[24]** In the light of the events which transpired it cannot be true when Nicholas Mujah mentioned in his Affidavit of Service (encl 23) that service was performed personally at or about 2:30pm on 24 July 2006 and in the face of admission from Mr Dominique Ng himself on 27 July 2006, in the DUN, that he has failed to serve the election petition papers as at that day.

**[25]** I am mindful of the fact that not much arguments were raised pertaining to the issue of service of a court process within the precincts of the DUN building. Nevertheless, there was an averment by the third respondent on exh AJN-1, a copy of the letter dated 25 July 2006 to the Speaker of DUN regarding his encounter on 24 July 2006 by two men and YB Encik Dominique Ng. Furthermore, the petitioner cannot be served in the precincts of the DUN and on this point, I adopt the views expressed by Datuk Clement Skinner J in Election Petition No 26–01 of 2006-I (SG) at p 19 line 12 to p 20 line 17:

Section 7 of the Ordinance [DUN (Privileges, Immunities and Powers) Ordinance 1963] states:

> No process issued by any court in the exercise of its civil jurisdiction shall be served or executed within the precincts of the Council while the Council is sitting or through the Speaker, the Clerk or any officer of the Council'.

And, s 2 of the Ordinance defines 'precincts of the Council' to mean:

> the chamber and offices of the Council Negeri and the galleries and places provided for the use or accommodation of strangers, members of the public and representatives of the press, and includes, while the Council is sitting, and subject to any exceptions made by direction of the Speaker, every part of a building in which the chamber of the Council is situated, which is provided or issued for the purposes of the council; and any Forecourt, yard, garden, enclosure or open space adjoining or appertaining to such building and used or provided for the purposes of the Council'.

On the facts before me I am satisfied that (a) the stairs leading to the main entrance of the Dewan Undangan Negeri is part of the building in which the chamber of the Council is situated; and (b) that on 24 July 2006 the Council Negeri Sarawak was sitting — this is evident from a copy of the Penyata Rasmi Persidangan Dewan Undangan Negeri for 27 July 2006, produced as affidavit of (he respondent which was affirmed on 21 August 2006 (encl 48). The Penyata Rasmi shows that the debates recorded on 27 July 2006 were on the occasion of the First Meeting of the First Session of the Sixteenth Dewan Undangan Negeri Sarawak and at p 3 of the Penyata Rasmi, it is recorded there what the Honourable Member for Layar (YB Datuk Patinggi Tan Sri (Dr) Alfred Jabu anak Ny(sic)mpang) on whom an attempt to serve an election petition in a different case had been made on 24 July 2006 on the directions of Mr Dominique Ng in the precincts of the Dewan as well, informed the Dewan 'what actually happened on the afternoon of the 24th July, 2006, the very same day of the official opening of Dewan sitting'.

According, I find that the respondent is protected by the immunity afforded to him by s 7 of the Ordinance, from service on him of any process of the court in the exercise of its civil jurisdiction while the Council was sitting. Such service of the petition on the respondent being prohibited by s 7, it is bad in law and ineffective.

WHETHER SERVICE BY PRE-PAID REGISTERED POST EFFECTED?

**[26]** Here, the petitioner relies on the two affidavits of Mo Hiong Leong (encls 25 and 56) affirmed on 14 August 2006 and 11 September 2006 respectively whilst the third respondent relies on the affidavit of Othman bin Abdullah (encl 38) affirmed on 21 August 2006. Basically, it is the contention of Mr Dominique Ng that the election petition papers were duly posted by Mr Mo by registered post on 27 July 2006 at the Satok Post Office as there is no evidence that the AR Registered Post No RD610210107MY is forged and neither was the chop 'Satok Sarawak' with the date of 27 July 2006 appearing in the documents, Post Malaysia Berhad Akuan Menerima Surat Berdaftar Dalam Negeri card and the Resit Serahan Posdaftar Dalam Negeri in exhs DWE6 and MHL 1A alleged to be forged; similarly it is not disputed that the chop of the office of the third respondent, Pejabat Timbalan Ketua Menteri Sarawak appearing on the same documents in exhs DWE6 and MHL 1A is genuine and Pejabat Timbalan Ketua Menteri Sarawak is the Office of the third respondent. Further, Mr Dominique Ng contended that it is only the duty of Mr Mo as the

process server to ensure that he duly posted the election petition papers on 27 July 2006 which he did at the Satok Post Office and there is no duty on his part to ensure that it goes through the internal processes and procedures alluded to by En Othman bin Abdullah, the Pengurus Negeri Sarawak of Post Malaysia Berhad.

**[27]** The third respondent disputed that the election petition papers were sent to him by pre-paid registered post because the petition was issued on 13 July 2006 and the petitioner had 15 days from 13 July 2006 to effect service of the petition on the third respondent and this time period would expire on 28 July 2006 which meant that when the election petition papers were despatched by prepaid registered post on 27 July 2006 it had to reach the third respondent on the next day, ie 28 July 2006 otherwise the petitioner would have not complied with r 15 of the Rules. In this regard, 1 now turn to the affidavit evidence of Encik Othman bin Abdullah who explained the procedures and process in Kuching of posting and delivery of a letter or article sent by registered post. In this context, not desiring to reinvent the wheel, I respectfully refer to the summary made by Datuk Clement Skinner J in Election Petition No 26–01 of 2006-I (SG) at pp 23–25 line 4 as follows:

> Encik Othman explained that to send a letter by registered post, a sender is required to use a 'Resit Pengeposan' which can be purchased from a post office for RM1.70. The Resit Pengeposan has two sides. On side 1 of the Resit Pengeposan are various self-adhesive labels marked 'A', 'B', 'C', 'D' and 'E'. Below Label 'E' is another smaller label ('the Small Label') which is not identified by any alphabet but only contains an alphanumeric code (hereafter 'the Registration Number') which is unique to that particular Resit Pengeposan. Thus Label 'A ', 'B', 'C', 'D' and 'E' as well as the Small Label all contain the same Registration Number.
>
> To use a Resit Pengeposan for sending or posting a registered letter, En Othman explained that the sender has to fill in the name of the addressee or intended recipient on Label 'A ' on side 1 and also fill in the same particulars on the box at the top left hand corner of side 2. Label 'A 'to 'E' and the Small Label are peeled off and affixed to the front left side of the envelope. The Resit Pengeposan and the envelope with the said Labels affixed are then presented at the relevant counter for registered mail at the post office.
>
> Upon such presentation, side 2 of the Resit Pengeposan is stamped with the official chop of the post office and this would show the date and place of posting. The Resit Pengeposan is then returned to the sender. Furthermore, Label 'B' would be peeled off from the envelope by the counter clerk and kept in the record of the post office. Encik Othman further explained that if a letter is sent by AR Registered Post, then an 'AR Card' would also be used. In such a case, aside from the details or particulars that are to be entered on the AR Card, the Small Label would be affixed to the AR Card at the place provided i.e. near to the words 'Under Registration No '.
>
> Encik Othman then explained that each working day, there would be a 'closing' for registered letters received at a post office. Label 'C' on each of the registered letters would be removed from the envelopes of the registered letters and kept in the records of the post office where the registered letter was posted. The Registration Number for each of the registered letters would also be entered into the computer records of Pos Malaysia Berhad. The registered letters are then sent to the Mail Processing Centre of Post Malaysia Berhad in Pending ('the Mail Centre').
>
> At the Mail Centre, the registered letters received from the various post offices in Kuching are scanned and the Registration Number of each of the registered letters would be entered into the computer records of Pos Malaysia Berhad.

Encik Othman explained that the next day, after processing the registered letters for delivery in a particular area would be fonvarded to the relevant post office accompanied by a despatch list ('the Despatch List') listing all the Registration Numbers of the registered letters being forwarded; the Despatch List would be verified by the post office receiving the same and kept at that post office.

Upon delivery of a registered letter, the postman delivering it would obtain the necessary particulars and signature required in Label 'A', after which Label 'A ' is then removed from the envelope of the delivered registered letter and kept at the post office where the postman is based. If the delivered registered letter was sent by AR Registered Post, then the name and identity card number of the recipient would have to be endorsed on the relevant AR Card, which is then taken back by the postman to the post office where he is based and then returned to the sender by ordinary mail.

**[28]** In relation to the said election petition papers sent by Mr Mo Hiong Leong by pre-paid registered post on 27 July 2006 as evident by exh DWE6, a copy of the AR Registered Receipt vide No RD610210107MY and the AR Card (called 'the petitioner's card'), Encik Othman deposed as follows:

> 4 MO HIONG LEONG say in Mo's Affidavit that he sent the 'said election petition Papers ' by prepaid registered post and produced (as exhibit 'DWE6') a 'copy of the AR Registered Receipt via No RD610210107MY'. I have checked and I affirm that it is not correct or true to say that the said election petition Papers was sent by prepared registered post. The detailed records of Pos Malaysia Berhad does not show any letter or item sent by registered post under the Registration Number of RM610210107MY. I would aver as follows:
>
> 4.1 I have examined exhibit 'DWE6'. The upper half of exhibit 'DWE6' (hereinafter referred to as 'the petitioner's card') shows what appears to be an 'AR card' which is normally used in connection with an 'AR Registered' letter. On the bottom half of exhibit 'DWE6' (hereinafter referred to as 'the petitioner's Postal Receipt') appears to be a 'Resit Pengeposan' with all the self-adhesive labels removed except the Label A. The Registration Number shown on the petitioner's Postal Receipt is 'RD6I0210107MY' (hereinafter referred to as 'the petitioner's Number'). There is nothing on the petitioner's card which shows that it relates to a registered letter sent, posted or registered with the petitioner's Number. Moreover, if the registered letter had been sent by AR Registered post, then there should be a self-adhesive label, with the petitioner's Number, affixed on the petitioner's card.
>
> 4.2 The petitioner's card bears a chop mark which appears to indicate that the relevant letter was posted at Satok Post Office on 27 July 2006. I have checked the records at the Satok Post Office. I can confirm that for 27 July 2006, no registered letter was sent or posted by registered post under the Registration Number of 'RD610210107MY' (ie the petitioner's Number) at Satok Post Office; No such registered letter was received by Satok Post Office for registered post and no such registered letter was sent from Satok Post Office to the Mail Centre.
>
> 4.3 I have also checked and there is also no record of any registered letter received by the Mail Centre under the petitioner's Number. In other words, no matter which post office in Kuching the registered letter may have been posted at (if posted at all), no registered letter with the Registration Number 'RD6J0210107MY' (ie the petitioner's Number) was sent to or received by the Mail Centre for processing and sorting.

4.4 As the stated address for delivery is at Tingkat 19, Wisma Bapa Malaysia, 93502 Petra Jaya, Kuching, Sarawak, the post office for delivery of registered mail would be the Petra Jaya Post Office. I have checked the relevant Despatch List and there is also no record of any registered letter with the petitioner's Number that was received by the Petra Jaya Post Office for delivery. In other words, no registered letter with the Registration Number 'RD610210107MY' (ie the petitioner's Number) was sent to or received by the Petra Jaya Post Office for delivery.

4.5 The petitioner's Postal Receipt (ie what is shown on the lower half of exhibit 'DWE6') shows Label A', which is the delivery receipt, still attached. If the said election petition Papers had been sent by registered post and had been delivered in the course of such registered post, then the said Label A would definitely not be in the possession of the petitioner or MO HIONG LEONG; it should be kept in the records of the post office of delivery which in this case is the Petra Jaya Post Office.

4.6 Further, the petitioner's card does not contain the endorsement of the name and Identity Card No of the person taking delivery of the registered item, which it would have had, if the letter or item delivered had been sent by AR Registered post.

4.7 The petitioner's card bears chop or stamp marks with a date of posting of 27 July 2006 and a date of delivery of also 27 July 2006. However, based on the process and procedure in Kuching for receiving, dispatching, sorting and delivery of registered letters, it is impossible that a registered letter posted in Kuching could be delivered in Kuching, the same day. The normal time for delivery of registered letters or items is three days.

5 I therefore confirm that what MO HIONG LEONG has alleged in the Affidavit, about the said election petition papers being sent by pre-paid registered post with the Registration Number of RD610210107MY, is not true.

**[29]** I agree with the submission of both the learned counsel for the third respondent that it is important to bear in mind that En Othman bin Abdullah is a disinterested witness who is independent and is not involved in these proceedings: there is no motive for him not to depose to the truth. Further, I also agree with the submission made on behalf of the third respondent that En Othman's evidence is consistent with common sense and in my view to believe otherwise would defy all logic since it is impossible to believe that a letter despatched by registered post on 27 July 2006 would reach its destination on that same day, particularly when one takes into account that on 27 July 2006, Mr Dominique Ng had stood up in the DUN to publicly proclaim that service had, as yet, not taken place. In the light of what En Othman has said regarding the procedures which had to be adhered to, I find that Mr Mo Hiong Leong's assertion that he had sent the election petition papers on 27 July 2006 by pre-paid registered post stands contradicted and I reject it.

**[30]** With regard to the petitioner's contention that the election petition papers were received by the third respondent at Pejabat Timbalan Ketua Menteri on 27 July 2006, I reject the contention for the reasons which has been expressed by Datuk Clement Skinner J in Election Petition No 26–01 of 2006-I(SG) at p 29 line 5 up to line 23 which I respectfully adopt mutatis mutandis as follows:

A First, as pointed out by En Othman Bin Abdullah, there is nothing on the AR Card produced by the petitioner (exh DWE6) which shows that it relates to the registered letter sent, posted or registered under Registration Number RD610210107MY. Further, if the registered letter had been sent by AR Registered post, then, as pointed out by En Othman Bin Abdullah, there should be a self-adhesive label numbered RD610210107MY affixed to the AR Card produced by the petitioner.

B Secondly, although the chop of Pejabat Timbalan Ketua Menteri appears on the AR Card produced by the petitioner, there is no evidence whatsoever to show that the chop of Pejabat Timbalan Ketua Menteri was affixed on 27 July 2006. Thirdly, the Resit Pengeposan with the Label 'A ' attached to it was produced by the petitioner as part of 'exh DWE6'. Although a chop of Pejabat Timbalan Ketua Menteri appears on that Label 'A ', there is no evidence whatsoever to show that the chop of Pejabat Timbalan Ketua Menteri was affixed on 27 July 2006.

**[31]** Therefore, it is clear that the election petition papers were not served on the third respondent whether personally or by pre-paid registered post within 15 days of its presentation as required by r 15 of the Rules. The consequence of the petitioner's failure thereof means that the jurisdiction of the election court is not invoked since the provisions regarding service of an election are mandatory, not merely directory and must be strictly observed with; and failure to comply would result in the election petition being dismissed (see *Devan Nair vYong Kuan Teik* [1967] 1 MLJ 261; *Chong Thain Vun v Watson & Anor*; *Hamid Datun v Majanggil & Anor*; *Richard E Yap v Tun Datu Mustapha bin Datu Harun* [1968] 1 MLJ 65; *Dr Lee Chong Meng; Charlee Soh Cheng Hiong v Pengerusi Pilihan Raya Negeri Sarawak & 2 Ors* [2002] 1 LNS 133; and *Rhina Bhar @ Rani Raj Pal v Karpal Singh a/l Ram Singh & 2 Ors* [1995] 4 CLJ 642).

NON-COMPLIANCE WITH THE RULE 9 READ WITH r 34 OF THE RULES

**[32]** Rule 9 of the Rules states:

9. Appointment of advocate by petitioner.

With the petition the petitioner or petitioners shall leave at the office of the Registrar a writing, signed by him or them, giving the name of an advocate -whom he or they authorize to act as his or their advocate or stating that he or they act for himself or themselves, as the case may be, and in either case giving an address within Malaysia at which notices may be left. Every such writing shall be stamped with the duty payable thereon under the law for the time being in force.

r 34 of the Rules states:

34. Notice of appointment of advocate.

An advocate shall, immediately upon his appointment as such, leave written notice thereof at the office of the Registrar.

**[33]** The petitioner is required by r 9 of the Rules to give the name of 'an advocate' whom the petitioner authorises to act as his 'advocate'. It is the third respondent's

contention that this is a clear reference to an individual and not a firm or a partnership. A

**[34]** It was submitted on behalf of the third respondent that r 34 of the Rules requires the petitioner's advocate, immediately upon his appointment to leave written notice of his appointment as the petitioner's advocate, at the office of the Registrar. In my view, r 34 not only applies to the petitioner's advocate but also to the respondent's advocate and the said Rule imposes an obligation on the petitioner's or the respondent's advocate as the case may be and not on the petitioner or respondent immediately upon appointing of an advocate, to leave written notice of his advocate's appointment at the office of the Registrar. My reason for saying this is because r 10 of the Rules {'Appointment of advocate by respondent') which provides, inter alia, 'any person returned may at any time after he is returned, send or leave at the office of the Registrar a writing, signed by him appointing an advocate to act for him or in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within Malaysia at which notices addressed to him may be left. ' is no longer applicable. This provision has been deleted vide Amendment Act Al 177 PU(B) 16/2003 which came into effect on 16 January 2003. Reverting to the facts of this instant case, the petitioner's advocate did not comply with the requirement of r 34 of the Rules as revealed by the search conducted by Lim Lip Sze who deposed to the effect that 'no written notice of appointment of advocate has been filed in accordance with r 34 of the Election Petition Rules 1954 (para 3 in encl 31). I will revert to this point hereafter. B C D E

**[35]** To support this proposition, the third respondent relied on the case of *Wilfred Nissom v Datuk Stephen Yong & Anor*; *Mohamad Shamsuddin bin Moktar v Chong Kim Mook & Anor* (Kuching Election Petition No K 1 & 2 of 1979) (unreported but re-produced at pp 665–78 of Tunku Sofiah's text '*Malaysian Election Laws*') where Datuk Charles NC Ho J (as he then was) after referring to rr 3(1), 9 and 34 of the Rules made the following findings at pp 672–673: F

> These rules, as I understand them, require:
>
> (a) ... G
>
> (b) ...
>
> an individual advocate not a firm of solicitors is to be appointed by the petitioner to act for him. I am aware that in an ordinary civil suit it is normal practice for the parties to appoint a firm of solicitors to act. However, on a proper interpretation, rule 9 read together with r 34 clearly requires that an individual advocate to be appointed. H

**[36]** In my view, support for the term 'advocate' in r 9 of the Rules refers to an individual and not to a firm is substantiated by the manner in which the term 'advocate' is used in the various statutes cited by both the learned counsel for the third respondent as follows: s 4 of the Advocates Ordinance Sarawak 1953 (Reprint 1966) Sarawak Cap 110, s 4 of the Advocates Ordinance Sabah 1953 (Reprint 1966) Sabah Cap 2, rr 2, 17, 21(2), 22(1), 34 and 35 of the Rules. Section 2 of the I

Bankruptcy Act 1967, s 3 of the Legal Profession Act 1976. Therefore, I respectfully agree with the views expressed by the learned judge in *Wilfred Nissom*'s case.

**[37]** Mr Dominique Ng submitted that an appointment of an advocate can be made before the trial of an election petition as happened in the present case, Mr Baru Bian and Mr See Chee How had been appointed by the petitioner and similarly in the case of the third respondent, apart from Mr Sim Hui Chuan, Dato' Cecil Abraham and Mr Lim Lip Sze were appointed as advocates by the third respondent. With due respect to Mr Dominique Ng, I cannot agree. What is of significance in r 34 of the Rules is that it is also spelt in mandatory terms as is evident by the use of the word 'shall' and the existence of the word 'immediately' demonstrates the importance for an advocate to act immediately upon his appointment as advocate by leaving written notice of his appointment at the office of Registrar in fulfillment of his obligation under r 34 of the Rules. It is to be noted the notice of appointment of advocates in respect of Mr Sim Hui Chuang, Dato' Cecil Abraham and Mr Lim Lip Sze were made immediately upon their appointment as advocates by the third respondent, ie 2 August 2006 in respect of the former and on 14 September 2006 in respect of the latter two by virtue of the praecipes paid and the cover letter dated 2 August 2006 in the case of the former and 14 September 2006 in the case of the latter two. (see encl 16 and 15; encls. 64 and 63; and encl 60 and 59 respectively).

**[38]** However, the petitioner has named a firm of 'Advocates' and not 'an advocate' in the notice 'Appointment of Advocate by petitioner' dated 13 July 2006 filed by the petitioner (encl 7). Since r 9 of the Rules contains a reference to 'an advocate' and not a firm of advocates, I agree with the submission of both the learned counsel for the third respondent that the petitioner has not complied with rr 9 and 34 of the Rules which are couched in mandatory terms like r 3(2) of the Rules. That being the case, by virtue of the plethora of authorities that election laws are to be strictly complied with, by naming a firm or advocates and not his individual advocate or advocates and by not immediately leaving a written notice of appointment of advocate, the petitioner and the petitioner's advocate has failed to comply with rr 9 and 34 of the Rules which warrants the petition to be dismissed on both grounds.

'RESULTS OF THE ELECTION AFFECTED' WITHIN THE MEANING OF S 32(A) OF THE ACT

**[39]** Ms Felicia Tan Ya Hua, the Returning Officer for the State Constituency of N31, Layar, during the 9th Sarawak State General Elections has affirmed an Affidavit on 10 August 2006 (encl 30) which averments contained therein are undisputed. In exh FT-4 a Gazette notification PU(B) 164 of 2006 exhibited to Ms Felicia Tan's affidavit, it is patently clear that the candidates running for the said State Constituency of N31 were the petitioner, the third respondent and one Peter Anak Jaban (Peter John Jaban). The total number of votes cast were 4,962 votes: the petitioner received 1,090 votes, Peter Anak Jaban received 105 votes, and the third respondent received 3,767 votes.

**[40]** There are various allegations made by the petitioner in his petition involving the following localities:

(i) Melaban;

(ii) Semumok Atas;

(iii) Semumok Baroh;

(iv) Engkalat;

(v) Merunjau;

(vi) Kabok Spak;

(vii) Temedak;

(viii)Tapeh;

(ix) Skatap;

(x) Meribong Layar;

(xi) Batu Lintang; and

(xii) Mupoh Spak.

**[41]** Based on the electoral roll referred to in para 6 of Ms Felicia Tan's affidavit, the total number of registered voters in the longhouses mentioned in the election petition (12 localities) is 805.

**[42]** Both the learned counsel for the third respondent had submitted that based on the following assumptions:

(i) all 805 registered voters turned out to vote in the Constituency of N.31 Layar;

(ii) all 805 registered voters voted for the third respondent; and

(iii) all 805 voters voted for the petitioner instead; the results of the election of the said Constituency would have appeared as follows:

Petitioner: 1,090 add 805 = 1,895 votes

third respondent: 3,767 less 805 = 2,962 votes

Peter Anak Jaban: 105 votes

TOTAL 4,962 votes

**[43]** It is clear from the above said computation that the result of the election would still not be affected if the 805 registered voters of the 12 localities had voted for the petitioner.

**[44]** The petitioner seeks to declare the election of the third respondent is null and void premised on s.32(a) of the Act. Section 32(a) of the Act requires that it be shown

by the petitioner, that general bribery, general treating or general intimidation has so extensively prevailed that they may be 'reasonably supposed to have affected the result of the election'. Mr Dominique Ng submitted that s 32(a) of the Act is a substantive issue which goes to the root of the election petition and which is an issue that can only be ventilated and is only relevant to the trial of election petition itself. Further, he submitted the words 'and all of the surrounding areas to vote for the said Datuk Patinggi Tan Sri Alfred Jabu ak Numpang, the third respondent' which appear in paras 3(ii)(a) and (b) suggest that when the names of the five longhouses were mentioned therein, it is not only the five longhouses' voters but also all of the surrounding areas. Mr Dominique Ng further submitted that the project with a total cost of RM30m being a road link all the way to Nanga Buai Padeh to Merunjau and to Ulu Spak Belong could not benefit just five longhouses but many voters in the surrounding areas to which the road passed and it cannot be said that such a project involved the construction of a mere 2 or 3 km road but a road that should well exceed 10km even by Sarawak standard. The court will not take these matters into consideration as they impinge on facts which should be adduced at a trial, if any. In addition, if Mr Dominique Ng disagreed with the number of registered voters in the 12 localities deposed in para 6 of Ms Felicia Tan's affidavit, why did he not file any opposing affidavit? Learned counsel also adopted the same argument in respect of para 3(ii)(c) of election petition pertaining to the words 'and all the surrounding areas' and the court's response is the same.

**[45]** In *Dato' Ismail Kamus v Pegawai Pengurus Pilihanraya, (Zainal Abidin bin Azim) & Ors* [2005] 3 MLJ 193 at p 252E and *Gan Joon Zin v Fong Kui Lun* [2004] 4 CLJ 729 at p 745c, in relation to s 32(b) of the Act, the Federal Court make it clear that in order to avoid the election, not only must non-compliance be shown; the petitioner needs also to prove that the non-compliance had affected the result of the election. In the former case, both the learned counsel for the third respondent had referred to a passage where the Federal Court held at p 252a–c as follows:

> Even if he had voted twice (which is an offence) it is our view that this could not have affected the result of the election. On record, there is no evidence at all to prove that a voter had voted twice. It therefore remains a presumption. Even if a voter had voted twice, there is no evidence to suggest that he had voted for the third respondent. It would be wrong, therefore, to assume that the third respondent had won because of these votes.

In this instant case although the ground relied upon by the petitioner is s 32(a) and not s 32(b) of the Act, I am of the view that a similar approach ought to be adopted in the interpretation of s 32(a), that is the petitioner has to demonstrate to the court how the allegation of general bribery, general treating or general intimidation has so extensively prevailed that they may be reasonably supposed to have affected the result of the election. Thus, on the facts and on the allegations made in the petition which are denied by the third respondent, even if proved, I find that the petitioner would not be able to demonstrate how the results of the election would have been affected within the meaning of s 32(a) of the Act.

**[46]** For the foregoing reasons, I allow the third respondent's application to strike out the petition with costs to be taxed unless otherwise agreed.

*Order accordingly.*

Reported by Sally Kee